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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1940

No. 703

IN RE ESTATE OF HARRIET A. MITCHELL,
Deceased.

EDWARD GUERIN,
Petitioner,

vs.

HAZEL M. GRIEFEN,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT FOR THE FIRST DISTRICT OF ILLINOIS, AND BRIEF IN SUPPORT THEREOF.

WILLIAM S. KLEINMAN,
Attorney for Petitioner.

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Petition for Writ of Certiorari.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your Petitioner, Edward Guerin respectfully prays for a writ of certiorari herein to review a certain final order of the Appellate Court for the First District of Illinois, being the higest court of said State in which a decision could be had. The judgment of the Appellate Court of Illinois was entered on May 22, 1940 and became final on June 12, 1940, when the Appellate Court denied a petition

for rehearing. Thereafter the Appellate Court granted a statutory certificate to the effect that there is fairly involved in the claim of the Petitioner more than $1500.00, thereby vesting jurisdiction in the Supreme Court of Illinois. A petition for leave to appeal to the Supreme Court of Illinois was duly filed on July 20, 1940; on October 16, 1940, that Court denied the prayer of the petition. This petition for certiorari, together with the certified transcript of the records of the Appellate Court and the Supreme Court are herewith filed in this Court, being within three months after denial of said petition by the Supreme Court of Illinois.

Summary and Short Statement of the Matters Involved.

The Petitioner is a brother of Harriet A. Mitchell, deceased. As one of her heirs at law and next of kin, he appealed from an order entered in the Circuit Court of Cook County, Illinois, admitting to Probate an unexecuted copy of a destroyed will of said deceased, as and for her last will and testament.

Harriet A. Mitchell departed this life on the 11th day of May, 1936. On May 19, 1936, letters of administration in her estate were issued by the Probate Court of Cook County to Louis G. Kailer, who duly qualified by having his bond approved. The heirs-at-law and next-of-kin of said deceased, consist of two brothers (including petitioner), two sisters, and the suriving heirs of a deceased half-sister. On January 10, 1938, almost 20 months after the issuance of letters of administration, Hazel M. Griefen, appellee herein, who is a niece of the deceased, and the daughter of one of the surviving sisters of said deceased, filed her petition in the Probate Court praying for the issuance of letters testamentary to her by virtue of her discovery of what she claims to be a pur-

ported copy of a will of Harriet A. Mitchell, the original of which is purported to have been executed on January 21, 1909. The basis for the petition is her allegation that said last will and testament "was thereafter destroyed under circumstances which did not amount to a revocation thereof within the provisions of the statute in such case made and provided, in that the same was not destroyed by the testatrix, Harriet A. Mitchell, herself or in her presence" (Rec. 2).

The estate consists of tangible personal property approximating $65,000 in value (Rec. 3).

The only testimony offered was on behalf of the respondent herein as the proponent of said purported copy, and consisted of the testimony of William S. Hefferan, who had been the lawyer for Mrs. Mitchell for many years, and is purported to have prepared and witnessed her will and to have thereafter destroyed it at her direction. The other witness was Mrs. William T. Anderson, whose maiden name was Ruth M. Burke, who in January 1909 was in the employ of Mr. Hefferan as his secretary, and is purported to have transcribed the original will and to have witnessed it.

To state the salient facts briefly, and assuming only for the sake of this statement that everything testified to by these witnesses to be true, we are confronted with the following set of circumstances: Mrs. Mitchell was a widow in 1909. On January 21, 1909, she went to the office of Mr. Hefferan, her attorney, for the purpose of making and executing her will, and for the further purpose of executing a petition as a preliminary step towards the adoption of her niece, the appellee herein. The witnesses testified that both instruments were prepared and executed that day. The executed will was enclosed by Mr. Hefferan in a white mailing envelope and deposited in his will box. The petition for adoption was never filed in any court and it remained in Mr. Hefferan's files, from which it was

taken and produced in court in this proceeding. Mrs. Mitchell made periodic visits to consult with Mr. Hefferan about various business and family matters. In the early part of June of 1914, Mr. Hefferan received a letter from Mrs. Mitchell, mailed from the Waldorf-Astoria Hotel in New York, which letter was typewritten and bore her written signature and contained the following message and direction.

> "I made a new will a few days ago, so kindly oblige me by destroying the one you have of mine" (Rec. 13).

Complying with this direction, Mr. Hefferan took the original will from his will box and from its envelope, tore up the will and threw it in his wastebasket (Rec. 39). Thereupon on June 15, 1914, he addressed a letter to Mrs. Mitchell, as follows:

> "Pursuant to instructions contained in yours of June 6th, sent to me from the Waldorf-Astoria, New York, I have destroyed your will which was left with me for safekeeping" (Rec. 15).

This letter was addressed and mailed to Mrs. Mitchell at her home in Chicago but as she was then away from the city, it was returned to Mr. Hefferan and he deposited it among his papers. Fifteen years later, on August 1, 1929, Mrs. Mitchell called on Mr. Hefferan, at his office, and during the course of that visit Mr. Hefferan handed her that original letter which had been returned to him by the postal department, in the original envelope as it was mailed to her. What then transpired is best understood, when stated in the words of the witness, as appears on pages 28 and 29 of the record.

> "Mrs. Mitchell was at my office on August 1, 1929, for some time and of course, I held a conversation with her. I know I handed her that document and I would not hand it to her without saying something

to her and I will try and tell you the best I can what I said to her. My recollection is that I told her after the receipt of her letter that I had written to her Chicago address telling her that I had carried out her instructions to destroy her will and that the letter had come back to me and here it was, and handed it to her. * * * She never mentioned her will to me after June 1914, except on the occasion when I handed her the letter in which I advised her that I had carried out her instructions to destroy her will. It was mentioned by me at that time. Here was a letter that had been sent back to me by reason of lack of address and it was received and that is all there was to it. It was not a subject for conversation. I carried out her instructions. I handed her the letter."

Mr. Hefferan appears to have made a record of this visit, for on his carbon copy of the letter he then handed to Mrs. Mitchell, which carbon copy is in evidence, Exhibit 4, (Rec. 15), appears this pencil notation in Mr. Hefferan's handwriting:

"8/1/29—Original of above was returned to me and today Mrs. Mitchell called at my office and I handed it to her."

Mr. Hefferan testified that Mrs. Mitchell had been his client for about thirteen years prior to 1909 and that all-told she had been his client for forty years. He saw Mrs. Mitchell once or twice a year, sometimes oftener. Her business was of a character which involved frequent talks with him because it covered not only her affairs, but her relatives' affairs. He saw Mrs. Mitchell on occasions between 1914 and 1929, but not as often as he had previously (Rec. 24). He has a definite recollection of seeing Mrs. Mitchell on a number of occasions during that period of time. After 1929 he did not see her as frequently; prob-

ably not more than three or four times (Rec. 25). Mr. Hefferan further testified that the first he learned of Mrs. Mitchell's death was on August 12, 1936, when Mrs. Griefen (respondent herein) accompanied by her husband came to his office to make inquiry about his dealings with Mrs. Mitchell.

Mrs. William T. Anderson testified that from May 1, 1908, to May 1, 1910 she was employed by Mr. Hefferan as secretary and stenographer. In January, 1909, she was called upon to transcribe a purported will of Harriet A. Mitchell, which had been dictated to her by Mr. Hefferan. She testified that she met Mrs. Mitchell in Mr. Hefferan's office in January, 1909 (Rec. 31); that her total contact with Mrs. Mitchell consumed probably fifteen or twenty minutes and she never saw her again after that, yet in December of 1937, almost 29 years later, upon being shown a photograph of Mrs. Mitchell by Mr. Rundall, at her home, she completely recalled the incident of her meeting Mrs. Mitchell and the circumstances attending the preparation and execution of the will of 1909. She further testified that although she wrote about twenty-four various wills while in Mr. Hefferan's employ, and she did not write this will any differently than any of the others of the twenty-four wills, and although she witnessed most of them, she was unable to recall any other will that she witnessed.

At the conclusion of this respondent's case, the Circuit court took the matter under advisement and thereafter, on April 19, 1939, entered an order admitting to probate the said destroyed will of January 21, 1909 in the form of said carbon copy. That is the order appealed from.

Three separate appeals were taken to the Appellate Court for the First District of Illinois, by several heirs at law of said deceased. One of said appeals was properly dismissed for failure to file a trial court record; the other

two appeals including your Petitioner's, were duly perfected. The parties to those appeals were represented by different attorneys, and the points raised in the respective briefs were different from each other.

The Appellate Court affirmed both appeals at the same time. However, in doing so, the Court rendered a full opinion in the other case, and thereupon made the opinion of that case binding upon this Petitioner's appeal, without in any wise passing upon the points raised by this Petitioner in his appeal, which points were not raised in the other appeal, but are separate and distinct therefrom, and are still unadjudicated.

The Appellant in the other case filed no petition for rehearing in the Appellate Court, nor a petition for leave to appeal to the Supreme Court of Illinois. This petitioner did file his petition for rehearing in the Appellate Court in which he clearly pointed out to that Court the differences in the points raised in the respective appeals and the fact that the opinion in the other case could therefore not be controlling in this case, particularly because the question of the ratification by the Testatrix of the destruction of this will, clearly urged by this Petitioner was not determined by the opinion and decision of the Appellate Court. Petitioner likewise pointed out to the Court that its failure to pass upon this issue properly raised in the Petitioner's appeal, amounts to a denial to him of substantial property rights, which has resulted in a deprivation of his property without due process of law, and to a denial of a complete legal remedy, as guaranteed to him under Article II, Sections 2 and 19 of the Constitution of Illinois, and under Section 1 of the 14th Amendment to the Constitution of the United States of America. The Appellate Court of Illinois denied the petition for rehearing and, as heretofore stated, leave to appeal to the Supreme Court of Illinois was thereafter denied.

II.

Jurisdictional statement.

1. The jurisdiction of this court is based upon Section 237B of the Judicial Code as amended by the Act of January 13, 1925; Volume 8, Fed. Code Annotated (FCA), Title 28. Judicial Code, Section 344b.

The series of proceedings which give rise to the existence of Federal jurisdiction, and hence this court's right to review this record is determined from the following circumstances:

Section 17, of the Wills Act of Illinois as then in effect, (Chap. 148, par. 19, Sec. 17, Illinois Revised Statutes 1939) read as follows:

> "19. *Manner of Revoking Will.* § 17. No will, testament or codicil shall be revoked, otherwise than by burning, canceling, tearing or obliterating the same, by the testator himself, or in his presence, by his direction and consent, or by some other will, testament or codicil in writing, declaring the same, signed by the testator or testatrix, in the presence of two or more witnesses, and by them attested in his or her presence; and no words spoken shall revoke or annul any will, testament or codicil in writing, executed as aforesaid, in due form of law."

This petitioner has never contended that the original will was destroyed in the presence of the testatrix. He has, however, contended and still contends that the testimony offered by the respondent clearly shows that this will was destroyed by "tearing", pursuant to the written direction by the testatrix to her lawyer as set out in her letter of June 1914, which letter was written *animo revocandi* and

that this act of destruction was fully ratified and approved by the testatrix as and for her act of revocation.

The testimony further shows that fifteen years thereafter, on August 1, 1929, Mrs. Mitchell, the testatrix called on the same lawyer at the same office where the destruction of the will had previously taken place, and among other things, the testatrix and her lawyer discussed the earlier destruction of this will. Her lawyer then handed her the original letter and envelope which he had theretofore mailed to her and which had been returned to him by the postal department. In this letter he informed her of his compliance with her request to destroy the will. Whatever defect had existed in the legal effect of the prior destruction of the will, nullifying its earlier attempted revocation, such defect was fully cured and the revocation was as complete on that day, August 1, 1929, as if the will had then been torn by her lawyer at her direction and in her presence. As more than six years had elapsed between the above date and the date of the death of the testatrix, and the will was neither republished nor restored by her, the contention of petitioner that this amounts to an adoption, confirmation and ratification of the destruction of this will represents the very heart of petitioner's appeal; this was strongly urged by him in the Appellate Court and in the Supreme Court of Illinois. An examination of the opinions of the Appellate Court in the present case and in the appeal immediately preceding this one, indicates unequivocally that this contention was neither considered nor passed upon by that Court. A full and complete adjudication of these substantial contentions, properly raised by Petitioner, is a right which the courts of Illinois should not have denied to this petitioner. Such right to a complete adjudication of substantial issues thus raised, is guaranteed to petitioner by the Constitution of Illinois and by the Constitution of the United States of America.

Section 2 of Article II of the Constitution of Illinois provides:

> "No person shall be deprived of life, liberty, or property, without due process of law."

Section 19 of Article II of the Constitution of Illinois provides:

> "Every person ought to find a certain remedy in the laws for all injuries and wrongs which he may receive in his person, property or reputation; he ought to obtain, by law, right and justice freely, and without being obliged to purchase it, completely and without denial, promptly, and without delay."

From these quotations, the Court will observe, that a "certain" remedy and "complete" justice are rights, guaranteed to petitioner in the courts of Illinois; a denial of either or both, constitutes a denial of due process, under the Illinois Constitution.

The denial of the Federal right to due process was likewise raised by petitioner in apt time and was adjudicated against this petitioner by the denial of his aforesaid petitions. The pertinent portion of Section 1 of the 14th Amendment to the Constitution of the United States of America reads as follows:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Although due process is regulated by State procedure, the failure to accord due process is a Federal question and justifies Federal supervision.

This petitioner, like any other party litigant, has a vested right to a complete adjudication of substantial issues properly raised in a court of review on appeal. This court has

held that the fundamental requisites of due process is the opportunity to be heard. *Grannis* v. *Ordean,* 234 U. S. 385, 394. The Appellate Court of Illinois by its failure to pass upon the controlling question as to the effect of the ratification by the testatrix of the prior destruction of her will, has thereby denied a complete adjudication and due process of law to this petitioner; the Appellate Court thus created the Federal question, and the right to appeal to this court. The breach of petitioners' constitutional rights was immediately called to the attention of the Appellate Court, by a petition for rehearing, which petition was overruled. The same grounds were presented to the Supreme Court of Illinois on petition for leave to appeal; this petition was denied. By these rulings, the Appellate Court for the First District of Illinois became the highest court in the State of Illinois in which a final decision was made, or could be had. The basis of jurisdiction for review of that decision by this court, is therefore complete. This Court recently held that whether the Federal question was adequately presented to the State Court is itself a Federal question. *Lovell* v. *City of Griffin,* 303 U. S. 444.

III.

Questions Presented.

1. Assuming the facts in the record to be as presented by respondent, and they are entirely uncontroverted by this petitioner, we come to the question as to the legal effect of this evidence. Does a statute which provides several methods of destruction for revoking a will, either by the testatrix or by her agent in her presence, preclude its destruction out of the presence of the testatrix, if such destruction is clearly ratified, as was done in this instance?

2. Could the destruction of this will in any manner be adopted, ratified, and approved by the testatrix before her death, so as to amount to its revocation?

3. A period of fifteen years elapsed between the time the testatrix directed her attorney to destroy her will and the time that its actual destruction was personally communicated to her by her said attorney. The testatrix evidenced no objection to its destruction, she neither republished nor restored this will; she died more than six years after that occurrence at her lawyer's office. Should not her intention that her will remain forever revoked so clearly manifested by her, be given legal effect by the courts?

4. In order to permit her property to be administered after her death as an intestate estate, should the testatrix have been required to indulge in the absurdity of making a new will and to then destroy that will, pursuant to the strict provisions of the statute, in order to make good the prior revocation of the will which is now before the Court?

5. Where the Illinois statute permits the destruction of a will by an agent, in the presence of a testatrix, to effect a valid revocation, why should not the same result be accomplished by a written direction from the testatrix to her agent, which direction is actually carried out, and is later clearly ratified and approved by her at a meeting between the testatrix and her agent?

6. The purpose of the statute relating to the manner of revoking wills is clearly intended to prevent fraud and imposition upon testators and their heirs. Where, however, the revocation is complete as it is in this case, and the testatrix was led to believe by her lawyer that her will was destroyed, and her intention that the will be and remain revoked and destroyed is manifest, does it not result in an imposition and an injustice to the testatrix and her legal heirs to permit her disinherited niece to now inherit her property, under this destroyed and clearly revoked will?

7. In reviewing this appeal did the Appellate Court of Illinois have the right to ignore these legal questions, and does not such action of the Court amount to a denial

of a complete adjudication of substantial issues, and therefore a denial of due process of law?

IV.

Reasons relied on for the allowance of the writ of certiorari.

1. The issues raised by this petitioner from the inception of this proceeding are still unadjudicated, and he has not been accorded due process of law.

2. Petitioner has been denied due process of law, as guaranteed by the Illinois and Federal Constitutions.

3. By failing to pass upon or consider the right or effect of testatrix' ratification of the destruction of this will, as urged by petitioner, the Appellate Court of Illinois failed to give effect to well established legal rights and principles.

4. The Appellate Court of Illinois has completely ignored or failed to give effect to the legal principles touching upon the right of the testatrix to ratify the act of her agent in destroying her will, and to the rule of law that such ratification amounts to and has resulted in a revocation of her will. This is the main contention in petitioner's appeal and has been wholly ignored, by the Appellate Court.

WHEREFORE, it is respectfully submitted that this Petition for Certiorari to review the judgment of the Appellate Court for the First District of Illinois should be granted.

EDWARD GUERIN,
Petitioner.

WILLIAM S. KLEINMAN,
Attorney for Petitioner.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT FOR THE FIRST DISTRICT OF ILLINOIS.

Opinion of Court Below.

The opinions of the Appellate Court of Illinois are reported in 305 Illinois Appellate Reports, at pages 289 and 494 respectively. They also appear in the record filed in this cause (Rec. 58-59), and in the appendix following.

Jurisdiction.

1. The jurisdiction of this court is based upon Section 237B of the Judicial Code as amended by the Act of January 13, 1925; Volume 8, Fed. Code Annotated (FCA), Title 28. Judicial Code, Section 344b.

2. The original date of the judgment of the Appellate Court of Illinois which is sought to be reversed is May 22, 1940 (Rec. 50). A petition for rehearing was filed within the ten days allowed by the rule of that court and the petition for rehearing was denied June 12, 1940 (Rec. 51). On the same date the petitioner's motion for a certificate of importance and an appeal to the Supreme Court of Illinois was likewise denied by the Appellate Court)Rec. 51). Thereupon on July 20, 1940, a petition for leave to appeal was duly filed in the Supreme Court of Illinois (Rec. 57). Said petition was denied on October 16, 1940 (Rec. 54).

3. The 14th Amendment to the Constitution of the United States was drawn in question by the Petitioner who specially set up and claimed rights and privileges thereunder, which were denied to him by the Courts of Illinois.

Statement of the Case.

The essential facts of the case are fully stated in the accompanying petition for certiorari, which also contains a full statement of the questions presented, and in the interest of brevity are not repeated here. Any necessary elaboration on the evidence and on the points of law involved will be made in the course of the argument which follows.

Specification of Errors.

The Appellate Court of Illinois erred:

1. In affirming the order and judgment of the Circuit Court of Cook County which admitted to probate in the Estate of Harriet A. Mitchell, deceased, a carbon copy of the destroyed and revoked will of said deceased, as and for her last will and testament.

2. In failing to hold that the destroyed will had in fact been duly revoked by the testatrix and was of no legal effect at the time of her death.

3. In failing to hold that the destruction of the will by the agent of the testatrix, at her request was accomplished *animo revocandi* and that she duly ratified and confirmed the acts of her said agent, with like intent.

4. In failing to hold that the lapse of time between the destruction of the will and the death of the testatrix during which time she took no steps to restore or republish her will, clearly showed her acquiescence in its destruction and her desire that upon her death, her property should be distributed as an intestate estate.

5. In failing to give consideration to pertinent propositions of law applicable to this case and urged by this petitioner.

6. In failing to apply rules of law properly applicable to this case.

7. In failing to accord to petitioner a "certain remedy" and "complete" justice as guaranteed by the Illinois Constitution in consequence of which he has been denied due process of law as guaranteed by the Illinois and Federal Constitutions.

Summary of the Argument.

1. Accepting every phase of the respondent's testimony to be true, a revocation of the will has been clearly established. This proposition should not have been overlooked or ignored by the Appellate Court, as it represents the heart of petitioner's contention.

2. The destruction of a will can be ratified by a testator or testatrix so as to amount to its complete revocation. This is supported by Underhill on Wills and by authorities from the highest Courts of the States of Pennsylvania, North Carolina and New Jersey, which states have statutes regulating revocation of wills, similar in nature and effect as the statute of the State of Illinois.

3. The rule of law contended for by Petitioner is of first impression in the State of Illinois. This is not an attempt to compel the courts of Illinois to adopt a position or rule of law inconsistent with, in conflict, or in preference to its own interpretation, but to finally effect an adjudication of the points properly raised by petitioner in the Appellate Court of Illinois. Until such issues have been duly adjudicated, petitioner has been denied due process of law.

ARGUMENT.

The Federal question came into being by the failure of the Appellate Court of Illinois to pass upon the main point raised by this Petitioner in his appeal, to the effect that there had been a complete ratification by the testatrix of the destruction of her will. This proposition should not have been overlooked by the Appellate Court nor should it be permitted to remain unanswered as it represents the very heart of this case. Petitioner's position, that there had been a complete ratification by the testatrix, is borne out by the respondent's own testimony. Its legal effect supports this petitioner's contention, as will be seen from well-recognized authorities.

Underhill, in his excellent work on Wills, made the following pertinent statement (Sec. 225, page 308):

> "If the will is destroyed without the consent of the testator, the act of destruction may be a valid revocation if it is ratified by him subsequently. But the ratification must be evidenced by some act which the Court may with reason infer that the original act of destruction was approved by the testator."

It therefore becomes obvious that if the destruction of a will *without prior consent* can be ratified, as stated in the above rule, then surely the destruction of a will *with prior consent* can likewise be ratified.

In an attempt to refute the propriety of petitioner's legal position, the respondent, in the brief which she filed in the Appellate Court of Illinois, cited the case of *Dower* v. *Seeds*, 28 West Virginia 113. In that case the Supreme

Court of West Virginia made the following applicable observation on page 137:

> "It would seem that where the testator has done all that he designed to do for the purpose of actual destruction, and believes that he has accomplished it, a literal compliance with the statute is not indispensable."

In this proceeding the Appellate Court of Illinois had presented to it a set of circumstances which called into consideration rules of law of *first impression in that State.* Like situations have however arisen in other states of the union, where the rules announced by the Supreme Courts of those states sustain the contentions herein urged by this Petitioner. It is important to note that the three states hereinafter referred to have provisions in their Wills acts of similar character as Sec. 17 of the Wills act of the State of Illinois. The respective statutes and decisions are as follows:

Pennsylvania.

STATUTE:

Purdon's Pennsylvania Statutes Annotated, Title 20, Chapter 2, Sec. 271, Page 219:

> "No will in writing, concerning any real estate, shall be repealed, nor shall any devise or directions therein be altered, otherwise than by some other will or codicil in writing, or other writing declaring the same, executed and proved in the manner hereinbefore provided; or by burning, canceling, or destroying the same by the testator himself, or by someone in his presence and by his express direction."

Sec. 272, Page 233:

> "No will in writing, concerning any personal estate, shall be repealed, nor shall any bequest or direction

therein be altered, otherwise than as hereinbefore provided in the case of real estate, except by a nuncupative will made under the circumstances set forth in Section four of this act, and also committed to writing in the lifetime of the testator, and, after the writing thereof, read to or by him and allowed by him, and proved to be so done by two or more witnesses."

DECISION:

The Supreme Court of Pennsylvania, in *Deaves' Estate,* 140 Pa. State, 242, had presented to it for consideration, the question as to the propriety of probating the contents of a will, the original of which was lost about two years before the testator's death. The Testator had knowledge of the fact that the will was lost and there was testimony that he intended making a new will, but he never did so. In denying probate of the lost will, the following language of the court below is quoted with approval by the Supreme Court, on Page 246:

"The testator, in the present case, knew for nearly two years that he had no will. He knew that if he should die without making another will his estate would be distributed under the intestate laws of the state. If he saw proper to take the chance, we cannot question his right to do so. Suppose his house and all his papers, including his will, had been burned two years before his death, of which he had full knowledge. Would a court of equity permit him to prove the contents of the destroyed paper, for the purpose of perpetuating its contents? Such a proposition would be absurd. The answer of the chancellor would be, Make a new will yourself. If he should refuse to writ a new will, the beneficiaries under the destroyed one could not be permitted, after his death, to come into court and reproduce his lost will; but, if the supposed fire had occurred so short a time before his death as to make

it practically impossible or unreasonable for him to re-write his will, the court might permit its contents to be proved.

In the present case, the decedent knew that his will was lost for a long time, and had frequently said that he intended to make a new one, but he did not do it. The court will not now do for him what he either neglected or declined to do for himself. It would be to do what the decedent, perhaps, would not have done upon mature deliberation and would undoubtedly be an act of gross injustice to his heir-at-law."

In approving this language, Mr. Chief Justice Paxson, said on Page 248:

"This was an attempt to probate a will alleged to have been lost during the lifetime of the testator. There is no doubt that when it is shown that the will of a testator was in existence, unrevoked, at the time of his death, and was afterwards lost or destroyed, its contents may be proved by parol, and the will, as thus reproduced, may be admitted to probate. So much was decided in Foster's App. 87 Pa. 67. The weak spot in the appellant's case is that there was no proof that the testator left behind him an unrevoked will, or any will whatever. On the contrary, it is an admitted fact that the will, which it was alleged the testator had executed, was lost or destroyed in his lifetime, and that its loss was known to him months before his death. There was proof of his declarations that he intended to make another will, possibly containing the same provisions, but he never did so. Knowing that he had no will, he declined or neglected to make one. From this a presumption of revocation may fairly be inferred."

North Carolina.

STATUTE:

North Carolina Code, Chap. 81, Art. 2, Page 1639, Sec. 4133:

> "No will or testament in writing, or any clause thereof, shall be revokable otherwise than by some other will or codicil in writing, or other writing declaring the same, or by burning, canceling, tearing or obliterating the same, by the testator himself, or in his presence and by his direction and consent; but all wills or testaments shall remain and continue in force until the same be burnt, cancelled, torn or obliterated by the testator, or in his presence and by his consent and direction; or unless the same be altered or revoked by some other will or codicil in writing, or other writing of the testator, signed by him, or some other person in his presence and by his direction, and subscribed in his presence by two witnesses, at least; or unless the same be altered or revoked by some other will or codicil in writing, or other writing of the testator, all of which shall be in the handwriting of the testator, and his name subscribed thereto or inserted therein, and lodged by him with some person for safe-keeping, or left by him in some secure place, or among his valuable papers and effects, every part of which will or codicil or other writing shall be proved to be in the handwriting of the testator, by three witnesses at least."

DECISION:

The circumstances presented in the case of *Cutler* v. *Cutler*, 130 North Carolina, 1, are helpful to a consideration and determination of the present petition. In that case an attempt was made to probate a paper purporting to be a will, the script of which was badly mutilated, as if such

multilation had been accomplished by moths or vermin. It appears that the testator knew of the mutilated condition of this document long before his death but did nothing about it. The Supreme Court of North Carolina on page 3 of that case, used the following language:

> "The paper itself showed the mutilations, and, as there was much evidence tending to show that the testator knew of the defaced condition of this paper long before his death, it was contended by the cavetor that if he did not tear the paper himself that there is abundant evidence showing that he accepted it as a destruction of his will, and that he intended to die intestate. And while it was not denied that there was evidence tending to show this to be the fact, the propounders contended that, unless the script had been defaced by the maker, or by someone for him in his presence, and by his direction, the will was not revoked; that he could not ratify the obliteration or destruction of the will by the vermin if he wished to do so; that a will properly executed could only be revoked in the manner above stated, or by making another will; and his Honor being of the opinion that the law was as contended by the propounders, so instructed the jury in substance. In this we think there was error."

New Jersey.

STATUTE:

Revised Statutes of New Jersey, Title 3, sub-title 2, Chap. 2, Page 4, (3-2-4):

> "No written will, or any devise or bequest therein, or any clause thereof, may be revoked except by:
>
> (a) Burning, canceling, tearing or obliterating the same by the testator himself or in his presence by his direction and consent; or
>
> (b) Another will or codicil in writing revoking or altering the same, or other writing declaring the revo-

cation, executed in the manner in which wills are required to be executed."

DECISION:

A decision which clearly states the applicable rule of law contended for by this petitioner, is found in the case of *Campbell* v. *Smullen,* 96 New Jersey Equity, 724. In that case, the testatrix in 1919 consulted her lawyer, Mr. Simons, to whom she handed a carbon copy of her will of 1915, stating that she had lost the original will. As requested, the attorney thereupon prepared two wills, one for her and one for her husband. These wills were intended to be identical with the provisions and phraseology of the lost will of 1915. The new will was delivered to the testatrix, but it was never executed and she died shortly thereafter. An attempt was thereupon made to probate a carbon copy of the lost will of 1915. In denying probate, the Court of Errors and Appeals of New Jersey adopted the following language of its advisory master, as appears on page 727:

"Whatever would have been the situation before the time the testatrix went to Mr. Simons to have a new will drawn, it is unnecessary to consider.

At that time, six or seven months before her death, she knew that her will was lost, or where it could not readily be found. She realized that under those circumstances she would, if she died, be considered, or at least, be in danger of being considered to have died intestate. That must have been the reason why she had a new will drawn. Yet she never executed the new will—with all the opportunity for doing so, she must be presumed to have had a good reason for not executing it. Everyone is charged with the knowledge of the legal consequences of his acts and his omissions. It is clear that the decedent realized the possible situation at the time of her death, and with the opportunity to provide against it did nothing."

It is true that this Court will not attempt to settle a point of purely local law on which the courts of the various states may differ. The importance of the citations from other states, concerning similar circumstances and under similar statutes as above quoted, becomes apparent when this Court takes cognizance of the fact that this is not an attempt to compel the Illinois courts of review to adopt an interpretation of another state, in preference to or in conflict with its own interpretation, but to convince this court that the points properly raised by petitioner are substantial, and of such importance that the decision of the Appellate Court of Illinois in this proceeding is incomplete, that it fails to effect a complete adjudication of the issues raised in this cause, and that substantial justice is not rendered unless and until the issues thus raised are fully adjudicated. These issues were clearly ignored by the Appellate Court of Illinois, in consequence of which, this petitioner has been denied that complete adjudication and due process which are guaranteed to him by the Illinois and the Federal constitutions.

CONCLUSION.

It is therefore respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers in order that the errors herein pointed out may be duly corrected; that the law with respect to the matters herein asserted may be properly and authoritatively defined. To that end and for that purpose a writ of certiorari should be granted and this court should review the decision of the Appellate Court for the First District of Illinois, and finally, to reverse such decision.

WILLIAM S. KLEINMAN,
Attorney for Petitioner.

APPENDIX

OPINION OF THE APPELLATE COURT IN THE INSTANT APPEAL.

MR. PRESIDING JUSTICE DENIS E. SULLIVAN delivered the opinion of the court.

Edward Guerin, a brother of Harriet A. Mitchell, deceased, brings this appeal as one of the heirs-at-law and next of kin, from an order entered in the Circuit Court of Cook County on April 19, 1939, admitting to probate an unexecuted copy of a purported will of said Harriet A. Mitchell, as and for her last will and testament. This appeal is taken from the same order as was entered in the Probate and Circuit Courts in the cause entitled, Appellate Court No. 40940, *In re Estate of Harriet A. Mitchell, Deceased,—Marie Campbell, Anna Bennewitz, Harriet Walpole and Minnie Clancy, Plaintiffs-Appellants,* v. *Hazel M. Griefen, Defendant-Appellee,* in which case we have today filed an opinion affirming the order of the Circuit Court, which court affirmed the action taken in the Probate Court.

Inasmuch as the facts and the law are the same in this case as in Case No. 40940, heretofore referred to, the decision in the instant case will be the same.

Therefore, for the reasons herein given, the judgment and order of the Circuit Court is hereby affirmed.

Judgment and order affirmed.

HEBEL and BURKE, JJ. concur.

OPINION OF THE APPELLATE COURT IN THE CASE IMMEDIATELY PRECEDING THE FOREGOING OPINION.

In re Estate of Harriet A. Mitchell, Deceased. Marie Campbell et al., Appellants, v. Hazel M. Griefen, Appellee.

MR. JUSTICE DENIS E. SULLIVAN delivered the opinion of the court.

A petition was filed in the probate court of Cook county by Hazel M. Griefen, defendant appellee, applying for letters testamentary on the estate of Harriet A. Mitchell deceased, said petition being based on a purported carbon copy of a last will and testament of said deceased, which said last will and testament is alleged to have been destroyed during the lifetime of the said testatrix, but it is alleged that said destruction was not performed, in compliance with the statute, citing Ill. Rev. Stat. 1939, ch. 148, par. 19, sec. 17 [Jones Ill. Stats. Ann. 110.231].

The probate court admitted the carbon copy and ordered that letters testamentary issue to said petitioner. From said order of the probate court plaintiffs appellants appealed to the circuit court where the order of the probate court was affirmed and from said order of the circuit court, plaintiffs bring this appeal to this court.

Three separate appeals were taken by the parties in interest from the probate court to the circuit court. On motion of counsel for defendant appellee, the three causes were consolidated in the circuit court and, the issues being identical, they were heard on the trial in the circuit court as one case. Separate appeals, however, have been taken to this court, which appeals have been docketed as Appellate Court *Campbell* v. *Griefen*, 305 Ill. App. 289, Gen. No. 40,940, *Guerin* v. *Griefen*, 305 Ill. App. 494, Gen. No. 40,491 and 40,492.

It appears from the evidence that Mrs. Harriet A. Mitchell, a widow, called at the office of her attorney sometime in January, ~~1940~~ 1929 and requested him to prepare for her a last will and testament; that said attorney took the information which Mrs. Mitchell imparted to him and dictated a will to his stenographer; that some days later Mrs. Mitchell returned to said lawyer's office and executed the will in the presence of Mr. Hefferan, Mrs. Anderson and Mr. Francis M. Keough, the latter being now deceased; that the will was then deposited with said attorney, Mr. Hefferan, for safekeeping and was placed by him into a will box which he kept in his vault.

It further appears from the evidence that in June, 1914, the said attorney received a letter from Mrs. Mitchell, dated June 2, 1914, which had been mailed from the Waldorf-Astoria Hotel in New York City, wherein the testatrix directed the destruction of the will, as she had made a new one; that according to the testimony of her lawyer, upon receipt of the letter directing the destruction of the will, he took the instrument from his will box and destroyed it by tearing it up and throwing it into the waste paper basket; that under date of June 15, 1914, he wrote a letter to Mrs. Mitchell at her Chicago address, acknowledging receipt of the letter of instructions and advising her that, in accordance with her request, he had destroyed the will; that a few days later the letter was returned to said attorney through the post office department, undelivered and he, accordingly, placed the same in his files.

It further appears from the evidence that on August 1, 1929, Mrs. Mitchell again called at the office of her said attorney and he advised her that he had destroyed the will in accordance with her directions and handed her the letter which he had written to her on June 15, 1914, which had been returned to him undelivered; that on May 11, 1936, Mrs. Harriet A. Mitchell passed away;

that no will was found and letters of administration issued as on an intestate estate.

The errors relied upon, and upon which the sole issue is brought before this court, is that it was error for the trial court to find the instrument executed by Harriet A. Mitchell on January 21, 1909, was and is the last will and testament of the said deceased, and that it was error to admit a carbon copy thereof to probate; that it error for the court to receive in evidence a purported carbon copy of the last will and testament dated January 21, 1909.

Defendant appellee contends that the destruction of the will, under the circumstances disclosed by the evidence, did not amount to its revocation.

It is agreed that the will of January 21, 1909, was a properly executed will and was in existence at the time the testatrix wrote to her attorney telling him to destroy it, which he did by tearing it and throwing it away.

Was this a revocation of the will in a legal sense? The Wills Act, Ill. Rev. Stat. 1939, ch. 148, par. 19, sec. 17 [Jones Ill. Stats. Ann. 110.231], reads as follows:

> "19. MANNER OF REVOKING WILL.] § 17. No will, testament or codicil shall be revoked, otherwise than by burning, canceling, tearing or obliterating the same, by the testator himself, or in his presence, by his direction and consent, or by some other will, testament or codicil in writing, declaring the same, signed by the testator or testatrix, in the presence of two or more witnesses, and by them attested in his or her presence; and no words spoken shall revoke or annul any will, testament or codicil in writing, executed as aforesaid, in due form of law." *Gartin* v. *Gartin*, 371 Ill. 418.

A mere reading of this statute and a consideration of the evidence produced in this case shows that there was not a compliance with the statute and no revocation was made of the will. No other will was produced, so that the will which was physically destroyed, remained a legal will and the best evidence to prove its contents would be a carbon copy thereof which was supplied by the attorney for Harriet A. Mitchell, deceased, and said attorney testified that it was a carbon copy of said will. Any fact can be proven by the best evidence obtainable and we cannot see how it can be contended that a carbon copy of an instrument, the original of which has been physically destroyed, would not be the best evidence obtainable. No evidence refuting this allegation appears and we do not agree with counsel for plaintiffs that the trial court committed error when it accepted this evidence and finding it had sufficient weight to prove it to be a carbon copy of the original will.

In the recent case of *Board of National Missions of the Presbyterian Church* v. *Sherry,* 372 Ill. 272, a will made in 1929 was found after the maker's death in 1938, upon which she had numerous pencil marks and notations. Amounts of bequests were stricken out, notes written in the margin indicating that devisees and legatees had died, and other changes made. The will was found in an envelope upon the end of which the maker had written, "August 1st, 1938 The enclosed will not to be executed Kate Bennett." The court quoted section 17 of the Wills Act and directed that the will be admitted to probate. The court at p. 278, said:

> "The argument is advanced that the notation on the envelope dated a few days prior to the death of the venerable testatrix is indicative of an intention to revoke the will. Proof is wanting that the writing was placed on the envelope in which the will was contained at the same time the marks and notations were

placed on the will itself. Even if the pencil notation on the envelope evinced an intention to revoke the will the notation is nevertheless inoperative as a revocation because it was not executed conformably to section 17 of the statute. An intention to revoke a will, unaccompanied by at least one of the acts prescribed by the statute and executed in compliance therewith, is insufficient."

Section 17, which we have quoted, the substance of which was re-enacted by the Probate Act of January 1, 1940, when section 17 was repealed and section 46 was adopted in lieu thereof, being set forth in Ill. Rev. Stat. 1939, ch. 3, par. 197, sec. 46 [Jones Ill. Stats. Ann. 110.294], reads as follows:

"197. § 46. REVOCATION.) A will may be revoked only (a) by burning, cancelling, tearing, or obliterating it by the testator himself or by some person in his presence and by his direction and consent, (b) by some other will declaring the revocation, (c) by a later will to the extent that it is inconsistent with the prior will, or (d) by an instrument in writing declaring the revocation and signed and attested in the manner prescribed by this Article for the signing and attestation of a will. Marriage by the testator shall revoke any existing will executed by the testator prior to the date of the marriage."

In *Walker* v. *Walker*, 342 Ill. 376, in explaining the purposes and intention of the legislature, the court said at p. 383: "All the authorities declare that the object of the law is to prevent fraud and imposition upon the testator or the substitution of a surreptitious will, and to effect that object it is necessary that the testator shall be able to see and know that the witnesses have affixed their names to the paper which he has signed and acknowledged as his will."

It is contended that the act of the lawyer in destroying the will, in pursuance of a letter, was "in the presence of" Mrs. Mitchell. We think the facts in this case clearly establish that the will was not revoked and that the court did right in admitting the carbon copy thereof to probate.

For the reasons herein given the judgment and order of the probate court and the circuit court are hereby affirmed.

Judgment and order affirmed.

HEBEL and BURKE, JJ., concur.